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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent;

and

JAMES WILLARD SUMMITT,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The Supreme Court of Kentucky published separate opinions for each petitioner. The opinions are reported in *Watkins v. Commonwealth,* Ky., 565 S.W.2d 630 (1978) (Appendix, hereinafter designated App., pp. 35Z-37) and

Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977) (App., pp. 112-116). In each petitioner's case the opinion of the United States District Court for the Western District of Kentucky is not reported (App., pp. 38-45, 117-120). The United States Court of Appeals for the Sixth Circuit consolidated each petitioner's case and its opinion is reported as *Summitt and Watkins v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979) (App., pp. 47-58).

JURISDICTION

In each case the order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 (App., pp. 59, 122). The petitions for writs of certiorari were granted on March 17, 1980 (App., pp. 123-124). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. No. 79-5949 - WATKINS V. BORDENKIRCHER

The petitioner, John Gregory Watkins, was indicted by the March, 1975 term of the Jefferson County Grand Jury on one count of armed robbery and one count of first degree assault

(Transcript of Record 153965 at p. 2, hereinafter referred to as TR 153965). The January 1977 term of the Jefferson County Grand Jury returned another indictment charging Watkins with one count of bail jumping (Transcript of Record 158242 at p. 2, hereinafter referred to as TR 158242). On June 20 and 21, 1977, the cases were jointly tried before a jury.

The evidence for the prosecution tended to establish that on January 11, 1975, at approximately 11:30 p.m., an attempted robbery occurred at the Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith, an employee and part-owner, and Donald L. Goeing, Sr. were working in the store when three or four black males entered the store (App., p. 7). Smith testified that one of them approached the counter, asked for a pack of cigarettes and, when Smith turned around, said "this is a hold up." (App., pp. 7, 18). Goeing was refilling the soda machine at this time, and when the assailant saw some movement in that direction he stated: "I said don't reach for anything" and fired two shots at Goeing (App., p. 9, 18). One shot hit Goeing in the arm and the other went through the right ventricle of his heart (App., p. 18). Goeing was hospitalized for twelve days and recovered after a three and a half month convalescence (App., p. 18).

The evidence against Watkins was based solely on identifications made by Smith and Goeing (App., pp. 7, 18). Defense counsel submitted a written pretrial motion for a suppression hearing on the identification testimony (App., pp. 3-4). Before any evidence was heard at trial, this motion was reasserted in court, out of the presence of the jury, and was overruled (App., p. 6). During Smith's testimony and prior to Goeing's testimony, defense counsel objected to not being allowed an *in chambers* hearing, since it forced him to

explore the circumstances of the line-up and show-up in the presence of the jury (App., p. 8). Repeated defense motions for a mistrial on the same basis were overruled (App., pp. 8, 24, 30). The trial court also overruled defense counsel's motion for a mistrial based on the admission of the identification testimony (App., p. 30). A review of the identification testimony at trial follows.

Smith gave a description to the police on the evening of January 11, 1975, which described the assailant as a light-skinned, black male, thirty-five years old, approximately five feet, nine inches tall (App., pp. 5, 11-13). The initial police report described the person shooting the gun as wearing a dark hat, light colored, slip-over shirt and being armed with a black steel snugnose (sic) revolver (App., p. 5). This report was admitted into evidence as Defense Exhibit Two (App., pp. 28-29). According to his testimony, Goeing saw his assailant for about five seconds before he lost consciousness (App., p. 20). On the day of his arrest, Watkins was placed in a three man lineup with two dark-skinned black males and was identified by Smith (App., pp. 14-16). Smith testified that at the time he made the identification he "wasn't completely sure" but later on, when he "got himself together," he was sure (App., p. 16). Watkins was then taken to the hospital in the custody of two police officers to be viewed by Goeing in his hospital bed. Goeing had been informed that the police were "going to let him see someone that he could identify." (App., pp. 22-23). Goeing testified that at the time of his identification, he stated; "[I]t could have been close enough that it could have been his twin brother, it could have been somebody else." (App., p. 23). Goeing stated at trial that he had seen Watkins several times in court since his initial identification. (App., p. 23). No other arrests were made in the case,

and no photographs or other possible suspects were shown to Smith and Goeing (Transcript of Evidence, hereinafter TE, pp. 71, 74).

Watkins took the stand in his own behalf and testified that he had not been involved in the crime (App., p. 31). Watkins stated that on the evening in question he had played pool with David English and Gerald Redman. He then spent the remainder of the night with English, who was his cousin (App., pp. 31-32). Watkins' whereabouts were confirmed by the testimony of David English and Gerald Redman (TE pp. 99-113). Anthony Dove was also called by the defense and testified that he was in the Thoroughbred Liquor Store on the evening of January 11, 1975, and that Watkins was not the man who shot Donald Goeing, Sr. (TE pp. 116-117).

At the conclusion of its deliberation, the jury returned a verdict of guilty on all counts and recommended the maximum sentence of twenty (20) years on the robbery and assault charges (TE pp. 180-181). Sentence was imposed accordingly (App., pp. 33-34).

B. No. 79-5951 SUMMITT V. BORDENKIRCHER

The petitioner, James Willard Summitt, was indicted in the Jefferson Circuit Court on September 19, 1974, for the rape of Donna Jean Furgason (Transcript of Record, hereinafter referred to as TR 2). The same day Summitt waived arraignment and entered a plea of not guilty to the offense charged (TR 3). On May 17 and 18, 1976, a trial on the merits was held.

The evidence for the prosecution tended to establish that sometime between 11:30 p.m. on July 20 and 1:30 a.m. on July 21, 1974, the prosecutrix was forced out of her car and

into another vehicle (App., p. 71). She was driven to another location where she was raped, and was then returned to her car (App., pp. 72-73, 78-83). The next afternoon, after a discussion with her stepfather, the prosecutrix reported the rape to the police (App., pp. 74, 86). On the evening of July 21, 1974, and again on July 23, 1974, the prosecutrix and her stepfather viewed police photographs in an attempt to identify her assailant (App., pp. 63, 66-67, 88-90, 92). On the second date, she identified a photograph of Summitt as her assailant (App., pp. 90-91). Although the photograph was requested by defense counsel, it was not produced at trial (App., p. 106). Therefore, it is impossible to determine whether the prosecutrix identified Summitt at her first opportunity and whether her photographic identification was made under highly suggestive circumstances. Although there was no formal lineup identification, Summitt was seen by his accuser in court on at least two occasions before the trial (App., pp. 95-96).

On the day of trial, prior to the time the first witness took the stand, a motion was made to suppress any in-court identification of Summitt (App., p. 60). The motion was overruled (App., p. 60). Defense counsel then unsuccessfully asked for a suppression hearing on the identification issue (App., p. 60). The prosecutrix was the only witness who testified concerning the rape. There was no corroborating testimony introduced by other eyewitnesses, nor any medical or scientific evidence introduced in support of her claim. Moreover, Summitt testified in his own defense that he was elsewhere at the time of the crime. Nevertheless, after hearing the evidence, the jury returned a verdict of guilty and a sentence of life imprisonment was imposed in accordance with the jury's recommendation (App., p. 111).

SUMMARY OF THE ARGUMENT

I.

Eyewitness identification has been recognized as one of the most tenuous forms of evidence. The miscarriages of justice resulting from mistaken identification have received attention from the courts and commentators alike. It is within this framework that this Court in recent years has focused a number of its decisions on the constitutional underpinnings of eyewitness identification procedures. To protect those accused of crimes from misidentification, the court began to formulate constitutionally acceptable guidelines for the admissibility of identification evidence.

The first decisions dealing with pretrial identification procedures found that an accused has the right to have counsel present at a post-indictment lineup. If the lineup was conducted in the absence of counsel, the out-of-court identification procedure was constitutionally invalid and the admission of the in-court identifications, without first determining that they were not tainted by the illegal lineup but were of independent origin, was constitutional error.

Subsequently, a new test was developed. Courts were to consider the totality of the circumstances surrounding an identification procedure, to determine whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification, that an accused was denied due process of law. This standard was later revised by the addition of a requirement that suggestive identification procedures had to be conducive to a very substantial likelihood of irreparable misidentification before a denial of constitutional due process of law would be found to exist.

The standard presently governing the admissibility of

identification evidence is whether the identification, under the totality of the circumstances, was reliable even though the confrontation procedure was suggestive. The factors supporting the reliability of the identification must be weighed against the corrupting effect of the suggestive identification confrontation. In light of the present standard for the admission of identification evidence, the question becomes - how does constitutional due process of law require the reliability of an identification to be weighed against the corrupting effect of the identification confrontation?

Although current case law emphasizes the reliability of the identification, the constitutional questions underlying the admissibility of the identification must be answered before the reliability of the identification can be considered. A hearing out of the presence of the jury is required by due process of law to enable the trial court to decide the questions of law emanating from the constitutional implications of identification evidence. While the reliability of the identification is a question of fact for the jury to decide, the failure to conduct a hearing out of the presence of the jury regarding the admissibility of identification evidence necessarily results in a jury not only deciding the questions of fact but also permits the jury to decide a question of law. Since the constitutional issues surrounding the admissibility of identification evidence must be resolved before the reliability of the identification may even be considered, due process of law requires the trial court to hear all of the identification evidence outside the presence of the jury. After deciding the legal issues involved, the court must weigh the factors supporting the reliability against the corrupting effect of the suggestive identification procedure. Such a hearing would thus maintain the distinctions between

the trial court and the jury and is warranted because the questions of law and facts surrounding identification evidence are intricately interwoven.

II.

A hearing out of the presence of the jury on the admissibility of identification evidence is also required to assure the accused that his Sixth Amendment right to the effective assistance of counsel is not abridged. Cross-examination is not a constitutionally acceptable alternative to a pretrial hearing out of the presence of the jury on the admissibility of identification evidence. An attorney's attempt to expose on cross-examination the weaknesses and pitfalls of an eyewitness' identification, forces the attorney to gamble his client's right to a fair trial on the answers of the witness. Inquiry on cross-examination into the circumstances surrounding a witness' identification, without knowing the basis of the identifications and the factors which contribute to the identification hardly comport with a defendant's Sixth Amendment right to the effective assistance of counsel.

In the absence of a hearing out of the presence of the jury on the admissibility of identification evidence, there is a two-pronged dilemma confronting an attorney. First, he could underscore the reliability of the identification by his cross-examination. Second, if he does not know the base for a witness identification, he may be reluctant to explore that area on cross-examination and may thus bypass an opportunity to adequately challenge the identification. In either situation the defendant would be denied effective assistance of counsel.

Furthermore, if the assistance of counsel is necessary to protect the constitutional rights of an accused at a "critical stage" identification procedure, then the logical extension of that rule would require the assistance of counsel to explore the base for the identification and to demonstrate unconstitutional identification procedures at a hearing outside the presence of the jury. This conclusion applies even under the current standards governing the admissibility of identification evidence.

The argument that a hearing out of the presence of the jury on the admissibility of identification evidence is even more compelling when the accused has been subjected to an identification procedure at which the Sixth Amendment right to counsel does not attach. To leave trial counsel no other alternative but to attack on cross-examination a witness' identification and the confrontation procedures upon which the identification is based, could often result in a denial of the accused's right to the effective assistance of counsel.

III.

The court's prior decisions in the area of the admissibility of a defendant's confessions provides a conceptual framework from which the constitutionality of requiring a hearing out of the jury's presence on the admissibility of identification evidence can be analyzed.

This court has previously recognized that the initial determination of the voluntariness of the confession involved questions of law which are properly considered by the trial judge outside the presence of the jury. Likewise, in determining the admissibility factors against the corruptive effect of the suggestive identification itself, the trial court must first determine the legal issues underlying the identifi-

cation procedure before allowing the question of reliability to reach the jury for its consideration. If the present balancing test governing the admissibility of identification evidence is left entirely up to the jury, then it will be impossible for a reviewing court to determine whether or not the admissibility of the identification comports with due process of law. A hearing conducted out of the presence of the jury on the admissibility of identification evidence is necessary to effecuate the guarantee of a fair trial consonant with due process of law.

IV.

The United States Court of Appeals for the Sixth Circuit erroneously concluded that due process of law did not require a hearing out of the presence of the jury on the admissibiity of identification evidence. The Sixth Circuit's decision is based upon an erroneous interpretation of prior decisions of this Court and is in conflict with decisions from other circuit courts of appeal.

(A)

As will be demonstrated in the brief, the evidence in petitioner Watkins' case indicates various factors which should be reviewed by the trial court, in a hearing outside the presence of the jury, to determine the existence of possible taint of the identification and whether or not the identification should have been admitted into evidence.

(B)

In petitioner Summitt's case, the only evidence of rape was the testimony of the prosecuting witness who made an in-court identification and an out-of-court identification based upon her review of some photographs. None of the photographs were produced before or at trial. Such circumstances as these also require that a hearing be conducted out of the presence of the jury to determine the admissibility of the identification evidence. The failure to conduct such a hearing made it impossible for defense counsel to know whether the prosecuting witness became aware of the petitioner's physical characteristics at the time of the rape or while viewing the photographs or from seeing the petitioner several times in court.

V.

The Sixth Circuit Court of Appeals found that the state trial court had before it all of the facts concerning the reliability of the identification evidence. The Sixth Circuit, accordingly, concluded that the petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence. Therefore, no denial of due process occurred.

The petitioners sumit that they were not given an adequate hearing or an independent determination of the reliability of the identification evidence, because defense counsel was forced to explore the reliability of the identification solely through cross-examination. This places a defense counsel in an untenable position. While trying to challenge the reliability of the identification he runs the risk of causing

irreparable prejudice to the accused by unavoidably bolstering the in-court identification through cross-examination. Indeed, the dissenting opinion in the Sixth Circuit recognized this dilemma and found that hearings out of the presence of the jury were required because of the serious question concerning the reliability of the courtroom identifications of the petitioners.

The decision of the Sixth Circuit is in direct conflict with decisions of other courts of appeal which hold that a trial court is required to conduct a hearing out of the presence of the jury to determine the admissibility of identification evidence. Some jurisdictions require a showing that a motion for such a hearing is not frivolous or require a showing of the impermissible suggestiveness of the identification procedures. However, the petitioners submit that such a requirement necessitates a hearing to determine the merits of a defendant's challenge to the identification procedures. Moreover, even if factors and standards were enunciated to give trial courts some guidance as to when a hearing was required out of the presence of the jury on the admissibility of identification evidence, the standards and factors themselves would have to be interpreted and applied on a case-by-case basis. Thus, a ruling that such a hearing is constitutionally required would not only comport with the due process considerations underlying the admissibility of identification evidence, but would also promote judicial economy by the existence of a more thorough record which would facilitate appellate review. The petitioners submit that the attempts of the reviewing courts below to determine the reliability of the identifications retrospectively is not an adequate or a reliabile substitute for a suppression hearing conducted at trial.

The petitioners have demonstrated that a hearing out of

the presence of the jury on the admissibility of identification evidence is constitutionally required to safeguard their rights guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution. Accordingly, the convictions should be reversed.

ARGUMENT

CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE.

I.

The problems posed by eyewitness identification in criminal cases have been the subject of much study by commentators.[1] Indeed, it has been noted that "[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined." Wall, Eyewitness Identification in Criminal Cases 26 (1965). The con-

[1]See for example Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957); Frankfurter, The Case of Sacco and Vanzetti (1927); Sobel, Eyewitness Identification, Legal and Practical Problems (1972); Wall, Eyewitness Identification in Criminal Cases (1965).

stitutional dimensions of eyewitness identification have been the focal point of numerous decisions of this Court in recent years. They have come to the fore as a result of suggestive identification procedures deliberately or inadvertently utilized by law enforcement authorities. In *United States v. Wade,* 388 U.S. 218 (1967) it was observed that "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. *Id.* at 228. The *Wade* court recognized both the practical and legal problems inherent in eyewitness identification:

> But the confrontation compelled by the state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identifications are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent - not due to the brutalities of ancient criminal procedures." The case of Sacco and Vanzetti 30 (1927) *Id.* at 228.

Thus, it was recognized that identification confrontation is fraught with the danger of suggestibility. *Id.* at 235.

The *Wade* court was also cognizant of the true significance of pretrial identification confrontations. "[I]t is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his

word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." *Id.* at 229.[2] The foregoing observation led the court to conclude that:

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness - "that's the man." *Id.* at 235.

It was with those considerations in mind that the court began to formulate constitutionally acceptable guidelines for the admissibility of identification evidence.

The *Wade* decision extended the Sixth Amendment right to counsel to a post-indictment, pretrial lineup.[3] If a defendant was denied his right to have counsel present at such a lineup, then the lineup was constitutionally invalid. *Id.* at 236-237. The witness' in-court identification of the defendant would be excluded from evidence if it emanated from the illegal lineup unless the prosecution could establish

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[2]The same conclusion equally applies to showups, photographic displays and other types of identification procedures.

[3]In *Kirby v. Illinois,* 406 U.S. 682 (1972) the Court declined to extend the *Wade per se* exclusionary rule to identification testimony based upon a police station showup that occurred in the absence of counsel after a defendant had been arrested but before he had been indicted or otherwise formally charged. See also *United States v. Ash,* 413 U.S. 300 (1973) in which the Court held that a defendant had no right to have counsel present to represent him at a post-indictment photographic display, containing the defendant's photograph, conducted by the prosecution for the purpose of allowing a witness to attempt an identification of the offender.

by clear and convincing evidence that the in-court identification was based upon an "independent source" or based upon observations of the suspect other than the lineup identification. *Id.* at 239-240, 242.

Wade was the first case in a trilogy of decisions which implemented constitutional safeguards to govern identification procedures. In *Gilbert v. California,* 388 U.S. 263 (1967) the Court applied the *Wade* decision to the States as a matter of constitutional law. As in *Wade,* the *Gilbert* court found that a defendant was denied his Sixth Amendment right to counsel when the police conducted a lineup without notice to, and in the absence of, the defendant's attorney. Thus, such an out-of-court identification procedure was constitutionally invalid and "[t]he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error." *Id.* at 272.[4]

The last decision in the trilogy was *Stovall v. Denno,* 388 U.S. 293 (1967) which added still another dimension to the *Wade* and *Gilbert* cases. In *Stovall* the petitioner challenged the admission of the victim's identification testimony. The basis of the challenge was two-fold. First, shortly after the crime, the petitioner had been confronted by the victim in a showup at the victim's hospital room in the absence of his counsel. Second, the petitioner argued that the showup was impermissibly suggestive primarily because he was the only

[4]*Gilbert* also enunciated a *per se* exclusionary rule concerning the in-court identification of the defendant by several persons who were not present at the robbery for which he was on trial, but who identified him at a lineup. The *per se* exclusion of their in-court identification was required because "[t]hat testimony is the direct result of the illegal lineup, come at by exploitation of [the primary] illegality." *Wong Sun v. United States,* 371 U.S. 471, 488. *Id.* at 272-273.

black person in the hospital room. After holding that the *Wade* and *Gilbert* decisions were not to be applied retroactively, the Court turned its attention to the constitutional due process implications of the identification procedure. The question which the Court considered was whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the petitioner was denied due process of law. In answering the question, the Court enunciated an additional standard of review. "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Id.* at 302.

From the *Wade-Gilbert-Stovall* trilogy emanated the "independent origin" and "totality of the circumstances" tests which were to determine the admissibility of identification evidence and the constitutional safeguards with which identification procedures must be conducted in order to comport with due process of law.

The next opportunity which the Court had to deal with pretrial identification procedures was in *Simmons v. United States,* 390 U.S. 377 (1968). In *Simmons* the petitioner asserted that he was denied due process of law because his pretrial identification from photographs was, under the circumstances, so unnecessarily suggestive and conducive to misidentification. The court reviewed the identification procedure pursuant to the "totality of the circumstances" test enunciated in *Stovall* and applied the following standard to determine if a due process violation occurred:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photographs will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substnatial likelihood of irreparable misidentification. *Id.* at 390 U.S. 384.

To the *Stovall* test, *Simmons* added the requirement that the suggestive identification procedure had to be conducive to a *very substantial likelihood* of irreparable misidentification before a denial of constitutional due process of law would be found to exist (Emphasis Added). With the addition of the above-emphasized words, *Simmons* imposed a stricter standard than *Stovall* for the determination of unconstitutional identification procedures.[5]

The next significant development in the case law pertaining to identification procedures and the admissibility of identification evidence occurred in *Neil v. Biggers,* 409 U.S. 188 (1972). In *Neil* a rape suspect was identified by a victim in a showup confrontation. The Court reviewed its prior decisions dealing with the scope of the due process protection against the admission of evidence derived from suggestive identification procedures. The *Stovall* test was analyzed, as well as the *Simmons* test, which restated the standard enunciated in *Stovall.* As noted by the Court, "the primary evil to be avoided is a very substantial likelihood of irreparable misidentification." *Id.* at 409 U.S. 198, citing *Simmons v. United States, supra* at 384. Consequently, the Court concluded that the appropriate standard was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was

[5]Subsequent to the *Simmons* decision, the Court decided *Foster v. California,* 394 U.S. 441 (1969). *Foster* was found by the Court to be "a compelling example of unfair lineup procedures." *Id.* at 394 U.S. 442. It is interesting to note that the Court, although citing *Simmons* in the *Foster* decision, applied the *Stovall* standard, i.e. based on the totality of the circumstance the conduct of the identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law, in determining that the identification procedures constituted a denial of due process.

suggestive." *Neil v. Biggers, supra* at 199. The Court listed a number of factors that had to be considered in evaluating the likelihood of misidentification. *Id.* at 199. Thus, the *Neil* decision shifted the primary emphasis in identification evidence. The overriding concern had become the "reliability" of the identification itself. Nevertheless, the reliability of an identification had to be measured against impermissibly suggestive identification procedures which constituted a denial of due process of law.

The evolving standards relative to the admissibility of identification evidence were most recently examined in *Manson v. Brathwaite,* 432 U.S. 98 (1977). The Court's prior decisions in *Stovall v. Denno* and *Neil v. Biggers,* both *supra,* were extensively reviewed in *Manson* which had as its central issue "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. *Id.* at 99. The question was answered in the negative, based primarily on the decision in *Neil v. Biggers, supra.* Using *Neil* as its foundation, the *Manson* court found that "the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Id.* at 106. This result was reached by concluding "that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and Post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. . . Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114.

Thus, it can be observed that while the emphasis is on the

reliability of the identifications as determined by the factors set out in *Neil,* the reliability itself must be examined by the effects upon it of a constitutionally impermissible and suggestive pretrial identification procedure. Although the case law on the admissibility of identification evidence has undergone a significant shift in emphasis as a result of the evolving standards between the *Wade* and *Manson* decisions, inquiry must be made to determine if the reliability of the identification is untainted by a suggestive identification procedure or if it inherently emanated from the suggestive identification procedures. In light of the foregoing, the question becomes—how does constitutional due process of law require the reliability of the identification to be weighed against the corrupting effect of the suggestive identification itself?

While the current case law puts emphasis on the reliability of the identification, the constitutional underpinnings of the admissibility of identification evidence still constitute the threshold inquiry to be determined before the question of reliability can even be reached. The *Neil* and *Manson* decisions, with their emphasis on the reliability of the identification, have not vitiated the constitutional considerations of identification evidence that were espoused in *Wade, Gilbert, Stovall* and *Simmons.* Indeed, the constitutional question underlying the admissibility of such evidence, must be answered before the reliability of the identification can be considered.[6]

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[6]In *Allen v. Estelle,* 568 F.2d 1108 (5th Cir. 1978), it was held that the due process requirement takes two steps: "First, as a threshold inquiry, the Court must decide whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of identification and triggers closer scrutiny by the Court to determine whether such a procedure created a substantial risk of misidentification. *Id.* at 1112. The Fifth Circuit in *Frank v. Blackburn,* 605 F.2d 910, 912 (5th Cir. 1979) cited the foregoing procedure with approval and cited the *Manson* and *Neil* decisions as the underlying authority for *Allen's* two-step due process requirement.

This Court has never explicitly ruled that due process of law requires a hearing out of the presence of the jury to determine the admissibility of identification evidence. However, the petitioners submit that the requirement of such a hearing is implicit within the principles enunciated by the decisions from *Wade* to *Manson* and is required to effectuate the constitutional safeguards to be utilized in identification procedures. The constitutional considerations are inherent, preliminary factors in determining the admissibility of identification evidence. Notwithstanding the shift of emphasis to reliability, the Court from *Wade* to *Manson* has indicated that the constitutional issues posed by identification evidence must still be resolved before such evidence can be admitted at trial.

Moreover, the constitutional implications of identification evidence are questions of law that must be determined by the trial court. Although the reliability of the identification is a question of fact for the jury to decide, the failure to conduct a hearing out of the presence of the jury regarding the admissibility of identification evidence, necessarily results in a jury not only deciding the question of fact but also permits the jury to decide a question of law. Such a result goes well beyond the province of the jury. As indicated above, all of this Court's decisions from *Wade* to *Manson* recognize that the constitutional questions involved in identification evidence must first be resolved before the reliability of the identification can be reached. Since the constitutional issues must be determined vis-a-vis the reliability of the identification, it is appropriate for the trial court to hear all of the identification evidence out of the presence of the jury and, after deciding the legal issues presented thereby, weigh the factors supporting the reliability against the "corrupting effect of the suggestive

identification itself." This procedure, of course, involves a determination of: 1) the constitutional issue - whether the identification procedure was suggestive, and 2) whether the reliability of the identification was irreparably tainted by the suggestive identification. After the trial court decides these questions of law, then the reliability of the identification becomes a question of fact to be resolved by the jury.

It is readily apparent that the questions of law and fact which are presented by identification evidence are intricately interwoven. If the trial court must determine the constitutional considerations espoused in the cases from *Wade* to *Manson,* then it necessarily follows that a hearing out of the presence of the jury is constitutionally required to resolve these questions of law before the jury can consider the factual aspects of the identification. The hearing, as a matter of course, would require the trial court to examine the factors underlying the reliability of the identification. Once the trial court has determined that the reliability of the identification stands on a constitutionally firm foundation, the overall factual issue of the reliability of the identification can be submitted to the jury for its consideration.

II.

The accused's Sixth Amendment right to the effective assistance of counsel is necessarily interwoven with the argument that due process of law requires a trial court to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. Such a hearing is required in order to assure the accused that his right to the effective assistance of counsel is not abridged.

If a hearing on the admissibility of an identification is not held, the Court in *Wade* noted:

> The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. *United States v. Wade, supra* at 240-21.

Thus, the *Wade* court recognized not only that cross-examination at trial is not a constitutionally acceptable alternative to pretrial hearing on the admissibility of identification evidence, but also recognized the inherent dangers of blind cross-examination into the area of an eyewitness' identification.[7] The Court directly addressed the inadequacy of cross-examination in attacking suggestive identification procedures as follows:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. State of Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. *Id.* at 235.

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[7]Trial counsel for petitioner Watkins recognized the danger of exploring a witness' identification on cross-examination without having had a pretrial hearing out of the jury's presence of the admissibility of identification evidence. (App., p. 8).

The inherent dangers posed by eyewitness identification and the variety of factors which affect the identification are more than adequately enumerated in *United States v. Wade, supra* at 228-229. An attorney's attempt to expose on cross-examination the weaknesses and pitfalls of an eyewitness' identification, forces the attorney to gamble his client's right to a fair trial on the answers of the witness. Inquiry on cross-examination into the circumstances surrounding a witness' identification without knowing the base of the identification and the factors which contribute to the identification hardly comports with a defendant's Sixth Amendment right to the effective assistance of counsel.[8]

In the absence of a hearing out of the presence of the jury to determine the constitutional underpinnings of identification evidence and how they are to be weighed vis-a-vis the reliability factors set out in *Neil* and *Manson,* trial counsel finds himself in a dilemma which seriously impedes his ability to provide his client with effective assistance of counsel. Trial counsel, with considerable justification, may be reluctant to explore the basis of a witness' identification with a searching cross-examination. He finds himself in a quandry about whether or not to ask particular questions of an identification witness on cross-examination. The dilemma with which trial counsel is confronted in such situations is two-pronged. First, he could do irreparable damage to his client's defense by blindly exploring the bases underlying a witness' identification. This is precisely the caveat esposed by the Court in *United States v. Wade, supra* at 240-241. Second, his failure to fully inquire about the circumstances surrounding a witness' identification may result in missing an opportunity to expose the weaknesses and flaws in the identification and thereby diminish the

[8]*Powell v. Alabama,* 287 U.S. 45, 53 (1932).

credibility of the identification. In either situation, it is impossible for trial counsel to render effective assistance of counsel to his client.

The failure to conduct a hearing out of the presence of the jury on the admissibility of identification evidence has the inevitable result of having a "chilling effect" on a defendant's constitutional right to fully confront and cross-examine the witnesses against him.[9] In the absence of such a hearing, counsel finds himself plagued throughout the trial with thoughts of whether or not he should ask particular questions of a particular witness regarding the witness' identification. Accordingly, the guarantee of a hearing out of the presence of the jury on the admissibility of identification evidence would appear to be a logical extension of a defendant's Sixth Amendment right to the effective assistance of counsel.

Indeed, the role and necessity of counsel at identification procedures weighed heavily in the *Wade-Gilbert-Stovall* trilogy. In *Wade* it was argued that the assistance of counsel was indispensable in protecting the defendant's right to a fair trial at which the witness could be meaningfully cross-examined. *United States v. Wade, supra* at 223-224. The *Wade* court found a post-indictment, pretrial lineup a "critical stage" of the prosecution to which the right to assistance of counsel attached. *Id.* at 236-237. The Court viewed the presence of counsel at critical stages to operate as an assurance "that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Id.* at 227. The assistance of counsel was necessary because "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive

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[9]*Pointer v. Texas,* 380 U.S. 400 (1965).

him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.* at 231-232. Thus, the constitutional implications of identification procedures required that an accused be able to exercise his right to the assistance of counsel and take advantage of the presence of counsel to protect him from unconstitutional identification procedures.

In *Stovall v. Denno, supra,* the Court re-iterated the rationale underlying the right to counsel which attached to post-indictment identification procedures by stating:

> We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. *Id.* at 298.

Thus, *Stovall* directly implied that a hearing was necessary at trial in order that counsel be able to demonstrate for the trial court any constitutional violations occurring at identification procedures. The right to a hearing on the admissibility of identification evidence necessarily follows from the accused's right to counsel at identification confrontations and is part and parcel of accused's Sixth Amendment right to counsel. If the assistance of counsel is necessary to protect the constitutional rights of an accused at a "critical stage" identification procedure, then the logical extension of that rule would require the assistance of counsel

to explore the basis for the identification and to demonstrate unconstitutional identification procedures at a hearing outside the presence of the jury. This conclusion applies even under the current standards governing the admissibility of identification evidence set forth in *Neil v. Biggers,* and *Manson v. Brathwaite,* both *supra,* since the constitutional implications of identification procedures must still be determined by weighing the reliability factors outlined in *Neil* against the corrupting effect of the suggestive identification procedures. *Manson v. Brathwaite, supra* at 114.

The right to counsel attaches only to those identification procedures which are deemed to be "critical stages" of the criminal justice system. *United States v. Wade*; *Kirby v. Illinois,* both *supra.* As indicated above, the *Wade* and *Stovall* decisions cogently set forth the necessity for counsel at "critical stage" identification procedures and how vital the assistance of counsel is at those procedures to fully protect an accused's right to a fair trial. The question therefore remains - if the identification occurs at a "non-critical stage," how can an accused be protected against the corruptive effects of a suggestive identification procedure without a hearing outside the presence of the jury? As demonstrated above, cross-examination is not always the most effective manner in which to attack the reliability of an identification and the confrontation procedures underlying the identification itself. Therefore, the argument that a hearing out of the presence of the jury on the admissibility of identification evidence is even more compelling when the accused has been subjected to an identification procedure at which the Sixth Amendment right to counsel does not attach. To leave trial counsel no other alternative but to attack on cross-examination a witness' identification and the con-

frontation procedures upon which the identification is based, could often result in a denial of the accused's right to the effective assistance of counsel. For these reasons, the constitutional right to a hearing out of the presence of the jury on the admissibility of identification evidence is a logical extension of the Sixth Amendment right to the effective assistance of counsel.

III.

It is also appropriate to analyze the constitutional necessity of a hearing outside the presence of the jury on the admissibility of identification evidence in light of this Court's decision in *Jackson v. Denno,* 378 U.S. 368, (1964).[10] It was held in *Jackson* that, "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. In *Jackson* the New York rule which was struck down by the court required that an issue to the jury. If the jury found the confession to be involuntary then it was to disregard it entirely, and determine guilt or innocence solely from the other evidence. If the jury found the confession to be voluntary, then it was to determine its truth or reliability and weigh it accordingly. *Id.* at 374-375. The Court found the New York procedure to be violative of the due process clause of the Fourteenth Amendment because it "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the

[10]*Stein v. New York,* 346 U.S. 156 (1953) was overruled in *Jackson v. Denno, supra* at 391.

trial," and "did not adequately protect Jackson's right to be free of a conviction upon a coerced confession. . ." *Id.* at 377. The Court found the constitutional violation to occur because:

> [T]he New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there indication of how the jury resolved disputes in the evidence concerning critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other. *Id.* at 379-380.

In *Pinto v. Pearce,* 389 U.S. 31 (1967), the Court reviewed the holding in *Jackson v. Denno, supra* that a defendant's constitutional rights are violated when this challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. The Court concluded that in light of *Jackson v. Denno, supra*:

> A confession by a defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found to be involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings out of the presence of the jury. *Pinto v. Pearce, supra* at 32.

The decisions in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra,* thus establish a conceptual framework from which the constitutionality of requiring a hearing out of the jury's presence on the admissibility of identification evidence can be analyzed.[11]

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[11]It would appear that such a hearing is required at the state level under *Townsend v. Sain,* 372 U.S. 293 (1962) in order to determine the factual complex in which the challenged identification was made.

The rulings in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra,* recognized that the initial determination of the voluntariness of the confession involved questions of law which are properly considered by the trial judge outside the presence of the jury. Likewise, in determining the admissibility of identification evidence by weighing the reliability factors against the corruptive effect of the suggestive identification itself,[12] the trial court must first determine the legal issues underlying the identification procedure before allowing the question of the reliability to reach the jury for its consideration (See Section I of petitioners' brief). The result in the case at bar should be the same as that reached in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra* - the trial court must determine the questions of law and the jury must decide the question of fact.

The dangers of allowing a jury to determine both the voluntariness and the reliability of a defendant's confession, as well as guilt or innocence, prompted the court to inquire:

> If it finds the confession involuntary does the jury - indeed, can it - then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession. Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows that a defendant has given a truthful confession? *Jackson v. Denno, supra* at 388.

With some modifications, of course, the same questions are equally appropriate in examining what a jury considers about identification evidence which is admitted without conducting a hearing out of the jury's presence to determine

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[12]*Manson v. Brathwaite, supra* at 114.

the admissibility of the evidence. If the *Manson* balancing test for determining the admissibility of identification evidence is left entirely up to the jury for its resolution, then it will be impossible to determine how the jury measured the reliability factors against the corruptive effects of the suggestive identification. A reviewing court would be unable to assess the jury's conclusion, the factors it considered, and the weight given to those factors. These problems would be avoided if the trial judge made the initial determination concerning the constitutional underpinnings of identification evidence in a hearing outside the presence of the jury and submitted his findings of fact (necessary to resolve the constitutional questions raised by the challenge to identification evidence) and conclusions of law. Such a procedure would comport with the due process clause of the Fourteenth Amendment and maintain the integrity of the criminal justice system by having judges decide questions of law and having juries decide questions of fact.

IV.

It remains to be considered how the foregoing principles are applied by the courts in general and to the case at bar in particular.

Prior to their respective trials, the petitioners, by counsel, moved for hearings out of the presence of the jury to suppress identification evidence.[13] The requested hearings were not

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[13]App., pp. 6, 60. Counsel for petitioner Watkins also filed a written pretrial motion requesting a hearing outside the presence of the jury to determine the admissibility of the identification testimony. (App., pp. 3-4). In addition, he moved for a mistrial based upon the trial court's failure to conduct the requested hearing (App., pp. 29-30).

conducted and the prosecution's cases against the petitioners were based primarily on identification evidence. In both cases, the out-of-court and in-court identifications were admitted into evidence.

The Sixth Circuit Court of Appeals concluded in its opinion[14] in the petitioners' cases (App., pp. 47-58) that due process of law did not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence (App., p. 52; 608 F.2d 251). The Sixth Circuit reached its result based upon its construction of *Jackson v. Denno* and *Pinto v. Pearce,* both *supra.*

> We conclude, then, that as applied to identification evidence, *Jackson v. Denno, supra* and *Pinto, supra,* only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process. App., p. 53; 608 F.2d 251.

The court did acknowledge that such a procedure is no doubt preferable because:

> An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the dissadvantage [sic] to defendant's counsel of investigating the propriety of the identification evidence in the

[14] *Summitt v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979).

> presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. App., pp. 50-51; *Id.* at 608 F.2d 250.

The court obviously recognized that the dilemma considered by *United States v. Wade, supra,* at 240-241, results when trial counsel is forced to challenge identification evidence solely by means of cross-examination. The petitioners have demonstrated above that such a procedure does not comport with due process of law nor protect their right to the effective assistance of counsel (See Section II.). Furthermore, the petitioners respectfully submit that the Sixth Circuit's construction of *Jackson v. Denno* and *Pinto v. Pearce,* both *supra* is erroneous. (See petitioner's brief, Section III). Case law supports the petitioners' position with respect to the analogy presented by *Jackson v. Denno* and *Pinto v. Pearce,* both *supra.*

In *United States ex rel. Fisher v. Driber,* 546 F.2d 18 (3rd Cir. 1976), a case substantially similar to the case at bar, the court felt obligated to "follow the mandate of *Jackson v. Denno, supra* in determining that *Townsend v. Sain,* 372 U.S. 293, (1962), requires an evidentiary hearing at the state level to determine the factual complex in which the challenged identification was made." The court in *Driber* went on to say, at 546 F.2d 21:

> The conceptual basis of a *Jackson* hearing is to permit a defendant to explore his legal contentions without the constraints imposed by the presence of a jury. The state procedures here did not satisfy the salutary rule announced in *Clemons v. United States,* 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), *cert. denied,* 394 U.S. 964, (1969), and *United States v. Allison,* 414 F.2d 407 (9th Cir.), *cert. denied,* 396 U.S. 968, (1969). Judge McGowan set forth the test for the District of Columbia Circuit in *Clemons:*

> Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The Court should then, on facts elicited outside the presence of the jury, rule upon whether a pretrial identification by the same eyewitness is violative of due process.

408 F.2d at 1237.

A similar test was formulated for the Ninth Circuit by Judge (now Chief Judge) Browning in *Allison:*

> [W]here a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

414 F.2d at 410. *Accord, United States v. Mitchell,* 540 F.2d 1163 (3d Cir. 1976). *See also United States ex rel. Phipps v. Follette,* 428 F.2d 912, 913 n. 1 (2d Cir.), *cert. denied,* 400 U.S. 908, (1970); *United States v. Cranson,* 453 F.2d 123, 125-126 (4th Cir. 1971), *cert. denied,* 406 U.S. 909, (1972); *United States v. Sutherland,* 428 F.2d 1152, 1155 (5th Cir. 1970), *cert. denied,* 409 U.S. 1078, (1972); *United States v. Broadhead,* 413 F.2d 1351, 1359 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017, (1970); *Haskins v. United States,* 433 F.2d 836, 838-839 (10th Cir. 1970). Cf. *United States v. Ranciglio,* 429 F.2d 228, 230 (8th Cir.), *cert. denied,* 400 U.S. 959 (1970).

Other decisions are in accordance with the foregoing authorities and find that the requirements for requiring a hearing out of the presence of the jury on the admissibility of identification evidence are grounded individually or collectively in *United States v. Wade, Gilbert v. California,*

Stovall v. Denno, and *Simmons v. United States,* all *supra.* See for example, *Allen v. Estelle, supra*; *Frank v. Blackburn, supra*; *United States v. Hurt,* 476 F.2d 1164 (D.C. Cir. 1973); *United States ex rel. Choice v. Brierley,* 460 F.2d 68 (3rd Cir. 1972); *United States v. Henderson,* 489 F.2d 802 (5th Cir. 1973); *Rudd v. Florida,* 343 F. Supp. 212 (M.D. Fla. 1972), aff'd 477 F.2d 805 (5th Cir. 1973); *Raggazzini v. Brierley,* 321 F. Supp. 440 (W.D. Pa. 1970); But see *Hill v. Wyrick,* 570 F.2d 748 (8th Cir. 1978); *Taylor v. Swenson,* 458 F.2d 593 (8th Cir. 1972); *United States v. Smith,* 546 F.2d 1275 (5th Cir. 1977).

The petitioners have indicated in Sections I, II, and III of the brief the constitutional considerations which require that a trial court conduct a hearing out of the presence of the jury on the admissibility of identification evidence. The foregoing case authority strongly supports the argument that such a hearing is a matter of constitutional right which stems from the Sixth Amendment right to the effective assistance of counsel and the due process clause of the Fourteenth Amendment. It remains to examine why the petitioners herein are entitled to a hearing out of the presence of the jury on the admissibility of identification evidence and how the denial of the hearing constituted irreparable prejudice to their rights to a fair trial.

(A)

Trial counsel for petitioner Watkins was well aware of the *Wade* dilemma of "bolstering the courtroom identification by bringing out and dwelling upon the prior identification during cross-examination of the prosecuting witness." *United States v. Wade, supra,* at 240. Indeed, defense

counsel objected strenuously to the necessity of using this technique and to the prejudice inherent in it (App., p. 8). However, despite his objections, he was forced to delve into the circumstances of the identifications in the presence of the jury.

The evidence in Watkins' case reveals various factors which should have been reviewed by the trial court to determine the existence of possible taint. A review of these factors follows.

(1) Neither of the eyewitnesses had much of an opportunity to view the assault. Walter Smith stated that he only saw the face of the man when he turned around from getting the man some cigarettes (App., pp. 9-10). The shots were immediately fired and the man ran out (App., pp. 9-10). It happened so quickly that Smith did not even have time to get the money out of the cash register (App., p. 9). Furthermore, Smith described the man as being about thirty-five years old, (App., pp. 5, 11-13) and Watkins was only seventeen at the time (App., p. 31). Goeing testified that he saw the man's face for about five seconds as he turned around from the soda machine. Shots were then fired, and he passed out (App., p. 20). Both witnesses stated that the assailant was a stranger and they had no reason to pay any particular attention to him (App., pp. 8, 19). He was just another customer until he stated that "this is a hold-up." The interval between the time this statement was made and the time the man ran out of the door was a matter of seconds. Thus, the opportunity for observation was minimal at best.

(2) The three man lineup was extremely suspect because it involved only one light-skinned, black male (App., pp. 15, 26-27). This was one of the few physical characteristics which Smith had described to police (App., pp. 5, 11-13). The fact that Smith was not sure of his identification at that

time, but became sure when he "got himself together," (App., p. 16) suggests that later in-court appearances with Watkins had the effect of strengthening his previously doubtful identification. The fact that he was not presented with any other possible suspects fitting the description, either by lineup or photograph, may have pressured Smith into identifying Watkins, particularly if he was aware of the fact that Goeing had identified Watkins as the man.

(3) The showup in the hospital was also suspect. The circumstances suggest that, when Goeing identified Watkins, he expected to see the man who had shot him. Goeing was aware that a man was being brought to his hospital bed in the custody of the police to be identified (App., pp. 22-23). He viewed no other suspects but Watkins, a young, light-skinned, black male, obviously suspected by the police. The circumstances of the identification were clearly suggestive and prejudicial. Goeing also expressed some doubt at the time of this identification. He said it was close enough that it could have been his twi brother, but it "could have been someone else." (App., p. 23). This doubt was predictably diminished with each court appearance or proceeding that involved Watkins as the criminal defendant. The District Court below provided an excellent overview of exactly the type of prejudice which confronted Watkins when it noted at App., p. 39.

> Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified by Goeing as the person who had fired the shots, and that this identification was reinforced in Goeing's mind by having seen petitioner several times while awaiting the

> call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a lineup two days after the robbery and there was shown three or four black males. He identified the petitioner at the lineup, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later on said that after he got himself together, he knew that petitioner was the man.

The District Court relied heavily on the extensive cross-examination of the prosecution's witnesses to reaffirm the lack of suggestiveness of the identification.[15] However, since Watkins' counsel was aware of the problem, there was necessarily an element of restraint involved which precluded a thorough examination. Watkins' counsel felt restricted by the inherent prejudice of blind cross-examination. Thus, he was put in the untenable position of trying to protect Watkins as much as possible from the introduction of prejudicial, perhaps inadmissible evidence, while at the same time seeking to discover facts about an identification of which he had no prior knowledge. Regardless of the guarded nature of the cross-examination, it unavoidably resulted in the same type of bolstering which *Wade* condemns and which could have been avoided if a suppression hearing had been held.

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[15]The Sixth Circuit found that the hospital showup did reflect an element of uncertainty on Goeing's identification but concluded, under the totality of the circumstances, that the showup identification was not so unreliable as to create a substantial likelihood of misidentification. The Court recognized that the lineup presented a very close question, but again concluded that under the totality of the circumstances there was no substantial likelihood of misidentification. App., pp. 55-56, 608 F.2d 252-253.

(B)

In the case of petitioner Summitt, the prosecutrix identified him from a book of photographs two days after the occurence. However, the photograph in question was not produced by the Commonwealth either before or at trial (App., p. 106). Thus, prior to his cross-examination of the prosecutrix at trial, it was impossible for defense counsel to know whether she became aware of Summitt's physical characteristics at the time of the rape or whether she became aware of them for the first time in viewing the photograph. Moreover, defense counsel established on cross-examination that Summitt may have been viewed by the prosecutrix on at least two occasions at the courthouse prior to the trial, with only the prosecutor and a police officer in the room, and without benefit of counsel. This may have bolstered the prosecutrix' identification at trial (App., pp. 94-97, 99).

The obvious uncertainty of the identification was such that defense counsel could not afford to leave it unexplored. However, in the absence of a hearing, the only method available to him to uncover the taint and its prejudicial repercussions was a "fishing expedition" at trial. Lacking knowledge of the extent of the problem, he could not even intelligently object to the introduction of the evidence. Because defense counsel was unable to determine prior to trial the extent of the unfairness of the identification, he was put in the untenable position of trying by cross-examination of the prosecutrix "to discover and reveal the unfairness, while bolstering the courtroom identification by bringing out and dwelling upon the prior identification." *United States v. Wade, supra* at 240.

In disposing of this contention, the District court below noted at App., pp. 117-118:

> The prosecuting witness identified the petitioner after viewing about 1200 photographs at Jefferson County Police Headquarters. Her testimony and the testimony of Detective Sanders, the investigating officer, withstood vigorous and extensive cross-examination on the possible suggestive nature of the identification procedure. Both the prosecuting witness and Sanders were adamant in their assertion that the prosecuting witness had identified petitioner without any suggestion from Sanders.

As in petitioner Watkins' case, the District Court below relied heavily on the cross-examination of the prosecutrix and police officer to reaffirm the lack of suggestiveness of the identification.[16] However, this forced cross-examination resulted in the very type of bolstering which *Wade* condemns and which could have been avoided if a suppression hearing had been held. Indeed, because no hearing was held, defense counsel was forced to lead both the prosecutrix and the police officer into those adamant assertions which the District Court relies on in its opinion.

V.

In *Summitt and Watkins v. Bordenkircher,* 608 F.2d 247, 251 (6th Cir. 1979) the Court of Appeals concluded that:

> [A]s applied to identification evidence, *Jackson v. Denno, supra* and *Pinto, supra,* only require that the

[16]The Sixth Circuit placed emphasis on its finding that the photographic identification was neither suggestive nor unreliable and that under the circumstances there was no substantial likelihood of misidentification. App., p. 54; 608 F.2d 252.

> trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

Since defense counsel in the petitioners' cases were forced to explore the reliability of the identification on cross-examination in the presence of the jury, it cannot be found that such a procedure constituted an adequate hearing on the reliability and admissibility of the identification evidence. The utilization of such a procedure places defense counsel in precisely the untenable position envisioned in *United States v. Wade, supra.* While trying to challenge the reliability of the identification in the presence of the jury, defense counsel runs the inherent risk of causing irreparable prejudice to his client by unavoidably bolstering the courtroom identification through cross-examination. This is an inevitable result of the hearing deemed adequate by the Sixth Circuit in *Summitt v. Bordenkircher, supra.*

The Third Circuit's decision in *United States ex rel. Fisher v. Driber, supra,* is in direct conflict with the Sixth Circuit's decision in *Summitt v. Bordenkircher, supra.* Analogizing the principles enunciated in *Jackson v. Denno, supra* to *Fisher,* the Third Circuit concluded that a state trial court is constitutionally required to conduct a hearing out of the presence of the jury on the reliability and admissibility of identification evidence where the request for such a hearing

is not a frivolous one. The petitioners' cases present serious questions of identification. By denying an *in camera* hearing on the reliability of the identification evidence, the state trial court forced the issue to be resolved in the presence of the jury. Prejudice from such a procedure can be presumed by the length of the sentence imposed on each petitioner.

The Sixth Circuit took note of the *Driber* decision that due process requires that the trial court hold a hearing to determine the admissibility of identification evidence out of the presence of the jury if the requrest for a such a hearing is "not frivolous".[17] App., p. 53; *Summitt v. Bordenkircher, supra* at 608 F.2d 251, citing *United States ex rel. Fisher v. Driber,* at 546 F.2d 22. The Sixth Circuit then concluded, "we note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing."[18] App., p. 53;

[17]The dissenting opinion of Judge Merritt (App., p. 58; *Summitt v. Bordenkircher,* 608 F.2d 253-254) recognized the serious question concerning the reliability of the courtroom identifications of the petitioners. Accordingly, Judge Merritt would have followed the *Driber* ruling that due process requires a hearing out of the presence of the jury where serious identification questions are present. Judge Merritt, citing *United States v. Wade, supra,* also took note of the defense counsel's untenable position when he is forced to challenge identification evidence solely by cross-examination.

[18]Some jurisdictions require that a hearing be conducted out of the presence of the jury on the admissibility of identification evidence only when the circumstances of the identification warrant such an inquiry or only upon a showing of impermissible suggestiveness in the identification procedures. See for example, *Hill v. Wyrick, supra; United States v. Eatherton,* 519 F.2d 603 (1st Cir. 1975); *United States v. Wingard,* 522 F.2d 796 (4th Cir. 1975). The petitioners submit that the foregoing is an inappropriate standard by which a court should decide whether or not to conduct a hearing out of the presence of the jury on the admissibility of identification evidence. First, as a practical matter, a

(continued)

Summitt and Watkins v. Bordenkircher, supra at 608 F.2d 251.

Defense counsel in each case raised the issue of tainted identification by requesting a hearing at the outset of the trial (App. pp. 3-4, 6, 60). It was then incumbent upon the court to determine the reliability of the identification. To avoid compounding any impermissible suggestiveness, the court should have made the determination in a hearing out of the presence of the jury. Alternatively, the court should have recognized its duty to determine the reliability of the identification at trial by those factors set out in *Neil v. Biggers, supra.* In *Manson v. Brathwaite, supra,* the Court specifically enumerates the factors which must be considered when a challenge to a pretrial identification is raised, in order to determine whether it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The *Manson* court articulated these factors at 432 U.S. 114:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation,

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(footnote continued from preceding page)
hearing would be required to determine if there was merit to a defendant's assertion that the identification procedure constituted a denial of due process. Secondly, appellate courts would constantly be asked to determine if the facts surrounding a particular identification were adequate to entitle the defendant to a hearing out of the presence of the jury on the admissibility of identification evidence. Even if standards and factors were enunciated in an attempt to give guidance to trial courts as to when a hearing was constitutionally required, the standards and factors would virtually have to be interpreted and applied on a case-by-case basis. Thus, a blanket rule, holding that due process requires such hearings on motion, would promote judicial economy and a more thorough record which would facilitate appellate review.

> and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

The court in *Manson* then proceeds to analyze these factors individually, devoting a numbered paragraph to each, thus demonstrating the manner in which this analysis is to be conducted. There is less potential for prejudice to the defendant if these factors are considered in the setting of a suppression hearing. However, the fact that a hearing is not held does not obviate the necessity for a reliable determination of those factors. This determination must be made at the trial level to afford the defendant his right to effective assistance of counsel, as well as to insure his right to a fair trial.

By contrast, in the case of each petitioner, the reviewing courts below have attempted to determine the reliability of the identification *retrospectively.* Such a retrospective ruling can only hypothesize about questions which might have been asked, but were not because of the presence of the jury. Moreover, such a retrospective determination completely ignores the prejudice to the defendant which results from his being required to test the identification through blind cross-examination at trial. It is virtually impossible at the appellate level to determine what price the defendant has paid for his efforts to expose a suggestive identification. Consequently, post-conviction findings do not provide a reliable substitute for a suppression hearing at the trial.

The failure of the trial courts to grant a prior *in camera* hearing on the identification by the eyewitnesses prejudiced the petitioners in two ways. First, at the trial level, the lack of a hearing resulted in truncated cross-examination of the prosecution witnesses and the bolstering of their in-court identifications by defense counsel. Second, at the appellate

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level, it provided the viewing court with an incomplete record of the proceedings on which to predicate the finding of a lack of prejudice. Under the circumstances presented, nothing short of a contemporaneous hearing could have satisfied the petitioners' right to a fair trial consonant with due process of law. Because of the possibility of suggestiveness in the pretrial confrontations, the denial of a hearing out of the presence of the jury on the admissibility of identification evidence deprived the petitioners of a fair trial in accordance with due process of law and the right to effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that they are entitled to have their convictions reversed on the grounds delineated above.

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